

STATE OF MICHIGAN

SUPREME COURT

HIGHLAND-HOWELL DEVELOPMENT  
CO., L.L.C.,

Petitioner-Appellant

v

TOWNSHIP OF MARION,

Respondent-Appellee.

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Supreme Court No. 130698

Court of Appeals No. 262437

Michigan Tax Tribunal  
No. 307906

**AMICUS CURIAE BRIEF OF  
THE STATE BAR OF MICHIGAN  
REAL PROPERTY LAW SECTION  
IN SUPPORT OF PETITIONER-APPELLANT  
HIGHLAND-HOWELL DEVELOPMENT, CO., L.L.C.**

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## STATEMENT OF QUESTIONS PRESENTED

1. Does a property owner in a special assessment district have a right to have the improvements for which the property is assessed built in accordance with the municipality's formally approved plans?

THE MICHIGAN TAX TRIBUNAL AND COURT OF APPEALS DID NOT ADDRESS THIS QUESTION.

AMICUS REAL PROPERTY LAW SECTION WOULD ANSWER: YES

2. Is a property owner's right to have special assessment improvements built in accordance with the municipality's formally approved plans a property interest protected by due process under the United States and Michigan Constitutions?

THE MICHIGAN TAX TRIBUNAL AND COURT OF APPEALS DID NOT ADDRESS THIS QUESTION.

AMICUS REAL PROPERTY LAW SECTION WOULD ANSWER: YES

3. Does due process require that, prior to a material change in plans for a special assessment improvement which affects the benefit to the specially assessed property, the affected property owners must be given notice and a meaningful opportunity to be heard?

THE MICHIGAN TAX TRIBUNAL AND COURT OF APPEALS DID NOT ADDRESS THIS QUESTION.

AMICUS REAL PROPERTY LAW SECTION WOULD ANSWER: YES



The  
COUNCIL OF THE STATE BAR OF MICHIGAN'S  
REAL PROPERTY LAW SECTION  
respectfully submits the following position on:

\*

Highland-Howell Development Company, L.L.C. v. Township of Marion

\*

The Real Property Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Council of the Real Property Law Section only and is not the position of the State Bar of Michigan. To date, the State Bar of Michigan does not have a position on this matter.

The total membership for the Real Property Law Section is approximately 3,400.

The position was adopted by a vote of the Council of the Real Property Law Section after discussion at a Council meeting on July 15, 2006, held in conformance with the Section's bylaws. The number of members in the decision-making body is 18. 12 were present at the meeting and voted in favor; none were opposed.



## Report on Public Policy Position

**Name of Section:**

Real Property Law Section

**Contact Person:**

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**Other:**

Amicus curiae brief in the Matter of Highland-Howell Development Company, L.L.C. v. Township of Marion

**Date position was adopted:**

July 15, 2006

**Process used to take the ideological position:**

Discussion at Council meeting on July 15, 2006

**Number of members in the decision-making body:**

18

**Number who voted in favor and opposed to the position:**

12 in favor, 0 opposed

6 members absent

**FOR SECTIONS ONLY:**

- ✓ This subject matter of this position is within the jurisdiction of the section.
- ✓ The position was adopted in accordance with the Section's bylaws.
- ✓ The requirements of SBM Bylaw Article VIII have been satisfied.

*If the boxes above are checked, SBM will notify the Section when this notice is received, at which time the Section may advocate the position.*

**Position:**

The Council respectfully requests that the Court hold that due process requires that real property owners subject to a special assessment from a Township be given an opportunity to contest the special assessment when the Township eliminates the benefit to the specially assessed property subsequent to the time allowed for filing a special assessment petition, and that the elimination of the benefit, which results in a lack of reasonable proportionality between the benefit and the special assessment amounts to a taking.

**There is no other specific legislation, court rule, or administrative regulation that is the subject of or referenced in this report.**

## **STATEMENT OF INTEREST**

The Real Property Law Section is concerned with decisions regarding ownership and development of real property. In particular, in the present case, the Real Property Law Section is concerned with the negative effect an affirmation of this case would have on the due process rights of real property owners. If the present action is affirmed, it will set the precedent that municipalities are permitted, by law, to make significant changes to plans affecting the benefit to specially assessed property on their own volition, and after the time for objecting to the special assessment has expired, without providing the affected property owners a means of seeking relief, in violation of their right to due process. Moreover, the Real Property Law Section is concerned that allowing the decision of the Court of Appeals to stand would permit a taking without just compensation because there is a significant disproportionality between the special assessment and the benefit to the property.



## **STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

The Real Property Law Section incorporates the Concise Statement of Material Proceedings and Facts in petitioner-appellant Highland-Howell Development Company, L.L.C.'s Application for Leave to Appeal.

## ARGUMENT

### I. Summary of Argument

This case concerns basic principles of fairness and due process. When a governmental entity formally resolves to confer a benefit on a person or entity and assesses that person or entity for such benefit, that governmental entity must not be allowed to later arbitrarily significantly reduce that benefit while at the same time continuing to collect the assessment. Basic concepts of fairness, embodied in the due process clauses of both the United States and State of Michigan Constitutions, require notice and a meaningful opportunity to be heard before government action can deprive a person of a property interest.

In the present case, Respondent-Appellee Marion Township (the “Township”) approved construction of a sewer system that included the construction of a sewer trunk line across Petitioner-Appellant Highland-Howell Development Co., L.L.C.’s (“Highland-Howell”) property (the “Property”), which was to confer a significant benefit to both Highland-Howell and its Property. Consequently, Highland-Howell’s Property was specially assessed for that improvement. *Highland-Howell Dev Co, LLC v Marion Twp*, unpublished opinion per curiam of the Court of Appeals, January 31, 2006 (docket no. 262437), p 1 (“Ct App Opin”). In 1997, after the special assessment roll had been confirmed and the 30-day time period in which to file a petition objecting to the assessment had expired, the Township unilaterally, informally and without notice to Highland-Howell, eliminated the trunk line from the Property. The Michigan Tax Tribunal dismissed Highland-Howell’s 1998 petition challenging the special assessment for the reason that Highland-Howell did not file the petition within 30 days of confirmation of the assessment roll, despite the fact that the Township’s action to eliminate the trunk line did not occur until well after the 30 day time period. *Id.*, p 2. In 2004, some 7 years after it informally

changed its plans to eliminate the trunk line, the Township Board adopted a resolution ratifying the changes to the plans. Highland-Howell promptly filed a petition objecting to the special assessments; however, this petition was also rejected by the Tax Tribunal. *Id.*, pp 2-4. The Court of Appeals affirmed, prohibiting any challenge to the special assessment because it was not filed within 30 days of the original 1996 assessment roll confirmation. *Id.*, p 6. The Court of Appeals also ruled that the Tax Tribunal had no jurisdiction over a claim that the Township violated Public Act 188 of 1954 (“Public Improvements Act”) by changing the sewer project plans. *Id.*

The unfortunate result in this case is that Highland-Howell has been deprived of a property interest—construction of the specific improvement for which it was assessed—without ever having a chance to contest that result on the merits. This clearly amounts to a violation of Highland-Howell’s due process rights.

## **II. Application of Due Process Principles to the Present Case**

It is elementary constitutional law that the government cannot act arbitrarily to deprive a person of a property interest. *Tolksdorf v Griffith*, 464 Mich 1, 7; 626 NW2d 163 (2001); *Attorney General v Flint City Council*, 269 Mich App 209, 215; 713 NW2d 782 (2005). Pursuant to the due process clauses found in both the United States and Michigan Constitutions, there must be notice and a meaningful opportunity to be heard before state action can deprive a person of a property interest.

Due process provides for both substantive and procedural rights. *Daniels v Williams*, 474 US 327, 337; 106 S Ct 677; 88 L Ed 2d 662 (1986) (Stevens, J, concurring); *Kampf v Kampf*,

237 Mich App 377, 382; 603 NW2d 295 (1999).<sup>1</sup> This includes the procedural right to a hearing before deprivation of a property right. *Mathews v Eldridge*, 424 US 319, 333; 96 S Ct 893; 47 L Ed 2d 18 (1976).

**A. A Property Owner's Interest in Receiving Specific Improvements for Which the Property is Specially Assessed Is a Property Interest Protected by Due Process**

The provisions in the Public Improvements Act set out a procedure by which a property owner obtains a vested property interest in the particular improvement that is financed by the special assessment. See MCL 41.721, *et seq.* The step by step procedure includes holding a public hearing on objections to the proposed improvements and to the assessment district, after which the plans, costs and special assessment district may be approved. Subsequently, a special assessment roll must be prepared, with the total amount of the assessment being allocated to the benefited properties in proportion to the benefit to each property.<sup>2</sup> After again giving notice, the

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<sup>1</sup> Due process protection is co-extensive under the Michigan and federal constitutions. *York v Civil Service Comm*, 263 Mich App 694, 702 n6; 689 NW2d 533 (2004); *People v Conat*, 238 Mich App 134, 157; 605 NW2d 49 (1999); *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999); *Gora v Ferndale*, 217 Mich App 295, 301; 551 NW2d 454 (1996), *rev'd on other grounds*, 456 Mich 704; 576 NW2d 141 (1998). Thus we cite both federal and state authority in this brief.

<sup>2</sup> There is a general agreement in the State of Michigan that in order for a special assessment to be valid, there must be some proportionality between the amount of the special assessment and the benefit to the property owners, derived therefrom. *Dixon Road Group v. City of Novi*, 426 Mich. 390, 401; 395 N.W.2d 211 (1986).<sup>2</sup> Moreover, "special assessments are permissible only when the improvements result in an increase in the value of the land specially assessed." *Kadzban v. City of Grandville*, 442 Mich 495, 501; 502 N.W.2d 299 (1993).

"A failure by this Court to require a reasonable relationship between the two [the special assessment and the benefit to the property] would be ***akin to the taking of property without due process of the law***. Such a result would defy reason and justice." *Dixon*, 426 Mich. at 402-403 (emphasis added)

Thus, the Supreme Court concluded that it will intervene where there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the property as a result of improvements. *Id.* at 403.

In the present case, the improvement intended to be constructed across the Property has been eliminated, thus significantly reducing the benefit to the Property; however, Highland-

township must hold a public hearing on objections to the assessment roll, after which the township confirms the assessment roll. Parties who object to their assessment then have 30 days to file a petition in the Michigan Tax Tribunal to appeal the assessment.<sup>3</sup> MCL 41.721 *et seq.* Under this procedure, it would seem that a property owner who does not appeal a special assessment is assured that the improvement for which the property is assessed will be built in accordance with the plans that were publicly filed and formally approved.

Due process protects property interests created under state law. The concept of “property” is given broad application when considering a due process claim. *Board of Regents v*

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Howell was still required to pay the special assessment that was calculated based upon the assumption that the sewer trunk line would be constructed across Highland-Howell’s Property. Since the benefit to the Property is significantly less than the amount of the special assessment levied on the Property, there is an absence of reasonable proportionality. Consequently, this lack of reasonable proportionality constitutes a taking of the Property, without due process of the law. *Dixon, supra* at 402-03.

When a taking has occurred, the United States Constitution and the Michigan Constitution provide that the affected property owner is entitled to just compensation for the value of the property taken. U.S. Const. Amend 5; Const. 1963, art. 10, § 2. A possible manner in which relief may be sought by a property owner subject to a special assessment for a planned improvement, when there is a subsequent change to the plan that materially affects the benefit to the owner’s property, would be under an inverse condemnation action. Inverse condemnation is a “cause of action against a governmental defendant to recover the value of property which has been taken in fact by the government, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.” *Mekur Steel Supply, Inc. v. City of Detroit*, 261 Mich.App. 116, 129; 680 N.W.2d 485 (2004), quoting *In re Acquisition of Land-Virginia Park*, 121 Mich.App. 153, 158; 328 N.W.2d 602 (1982). Additionally, inverse condemnation may arise out of the government’s “regulatory taking” where property is effectively taken by being overburdened with regulation. *Dorman v. Clinton Twp*, 269 Mich.App. 638, 646; 714 N.W.2d 350 (2006).

There clearly has been a taking of Highland-Howell’s Property by virtue of the excessive special assessment. Michigan law explicitly provides that a lack of reasonable proportionality between the benefit to the property and the special assessment is “akin to the taking of property.” *Dixon, supra* at 402-03. Accordingly, if this Court allows the decision of the Court of Appeals to stand, it would permit a taking without just compensation.

<sup>3</sup> 2006 PA 174 amended MCL 205.735 by changing the time deadline for filing a special assessment petition from 30 to 35 days.

*Roth*, 408 US 564, 571-572; 92 S Ct 2701; 33 L Ed 2d 548 (1972); *Bundo v Walled Lake*, 395 Mich 679, 690; 238 NW2d 154 (1976). “[P]roperty” denotes a broad range of interests that are secured by ‘existing rules or understandings.’” *Roth*, 408 US at 576; *Perry v Sindermann*, 408 US 593, 601; 92 S Ct 2694; 33 L Ed 2d 570 (1972); *Bundo*, 395 Mich at 690. To have a property interest protected by due process in a particular benefit, a person must have a “legitimate claim of entitlement” to the benefit. *Castle Rock v Gonzales*, \_\_ US \_\_, \_\_; 125 S Ct 2796, 2803; 162 L Ed 2d 658 (2005); *Roth*, 408 US at 577; *Williams v Hofley Mfg Co*, 430 Mich 603, 610; 424 NW2d 278 (1988); *Dow v Michigan*, 396 Mich 192, 204 n19; 240 NW2d 450 (1976); *Bundo*, 395 Mich at 692.

“It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.”

*Roth*, 408 US at 577; *Williams*, 430 Mich at 610; *Bundo*, 395 Mich at 692.

A property owner’s interest in receiving the specific improvements formally approved by the township is such an interest protected by due process. It is “unquestioned that the owner of real property is entitled to claim the protection of the Due Process clause in respect to the assessment and collection of taxes.”<sup>4</sup> *Dow*, 396 Mich at 203-204.

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<sup>4</sup> This Court has applied due process analysis to the process of imposing a special assessment on property under the drain code. *Int’l Salt Co v Herrick*, 367 Mich 160, 167-169; 116 NW2d 328 (1962). It found unconstitutional a process that gave conclusive effect to a drain commissioner’s determination without a hearing that an improvement benefited specially assessed property. *Blades v Genesee County Drain District No 2*, 375 Mich 683, 693; 135 NW2d 420 (1965). *Accord*, *Chesebro v Los Angeles County Flood Control Dist*, 306 US 459, 464; 59 S Ct 622; 83 L Ed 921 (1939) (property owner entitled to hearing on whether property is benefited by flood control improvements in special assessment district); *Browning v Hooper*, 269 US 396, 405-406; 46 S Ct 141; 70 L Ed 330 (1926) (property owners entitled to hearing on whether their property is benefited by roads to be constructed in special assessment district).

Accordingly, the statutory procedure for the creation of a special assessment creates a property interest protected by due process. Under that procedure, a property owner is assured of receiving the improvements set out in the plans that are publicly filed and officially approved. A property owner who is satisfied that the special assessment is proportional to the benefit conferred by those improvements can forego appealing the special assessment with the assurance that the improvements will be built as they were formally approved in the special assessment process. The expectation of receiving the specific improvement set out in the formally approved plans is based on “existing rules or understandings” (*Roth*, 408 US at 577; *Perry*, 408 US at 601; *Bundo*, 395 Mich at 690)—namely the special assessment process that provides for notice to property owners of what they will receive in exchange for payment of the special assessment and a short time to appeal the special assessment. There is thus a “legitimate claim of entitlement” to have the improvements built as set out in the formally approved plans. *Castle Rock*, 125 S Ct at 2803; *Roth*, 408 US at 577; *Williams*, 430 Mich at 610; *Dow*, 396 Mich at 204 n19; *Bundo*, 395 Mich at 692.

**B. Due Process Requires That, Before There Is a Material Change in Plans for a Special Assessment Improvement, the Affected Property Owners Must Be Given a Meaningful Opportunity to Be Heard**

Once it is determined that there is a property interest protected by due process, there must be a meaningful opportunity to be heard before state action can deprive a person of that property interest. “The core of due process is the right to notice and a meaningful opportunity to be heard.” *LaChance v Erickson*, 522 US 262, 266; 118 S Ct 753; 139 L Ed 2d 695 (1998). “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews*, 424 US at 333. *Accord, Los Angeles v David*, 538 US 715,

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717; 123 S Ct 1895; 155 L Ed 2d 946 (2003); *York v Civil Service Comm*, 263 Mich App 694, 702; 689 NW2d 533 (2004); *Hanlon v Civil Service Comm*, 253 Mich App 710, 723; 660 NW2d 74 (2002).

Thus, in the present case, the Township's unilateral action to eliminate the intended improvement to the Property, the construction of the sewer trunk line, without providing Highland-Howell with a meaningful opportunity to be heard, is a violation of Highland-Howell's due process rights and Highland-Howell is entitled to seek relief. Due process requires that the government provide a meaningful opportunity to be heard to a property owner before depriving that property owner of the benefit of a specific improvement formally approved under the Public Improvements Act. If the holding in the present case is affirmed, governmental entities will be given free reign to arbitrarily remove an approved benefit from specially assessed property, while still being able to collect the special assessment, and the affected property owners will have no means of redress if they did not file a petition objecting to the assessment within 30 days of its confirmation.

Under the circumstances of the present case, applying the 30-day filing requirement would violate due process. It would have required Highland-Howell to file a petition challenging the 1996 special assessment before the removal of the sewer trunk line from the plans even occurred! It makes no logical or legal sense to require a party to file a case before its claim arises. Imposing that requirement would deprive the party of a meaningful opportunity to be heard after the challenged decision. Such actions are contrary to the United States and State of Michigan Constitutions. Therefore, Highland-Howell must be given an opportunity to have its case heard on the merits.



### **III. Important Policy Considerations**

#### **A. Certainty and Fairness**

A property owner should be able to rely on officially adopted plans for a particular improvement when the property bears the burden of a special assessment for that improvement. Principles of fairness require a means of redress to the affected property owners when there is a change in the plans that significantly reduces or eliminates the benefit to the property. Consistent with the discussion of the requirements of due process, this Court should not construe the Public Improvements Act as permitting such a change unless there is a corresponding opportunity for a property owner to obtain a hearing to review such a decision.

A construction of the Public Improvements Act that provides a means of obtaining relief when there is a change in project plans that diminish the benefit to the specially assessed property promotes certainty and predictability in property ownership and development. A person who owns specially assessed property would know, with certainty, what benefit the property will receive in exchange for the assessment and would be able to rely on that knowledge in future planning, without having to speculate as to whether the township might alter its plans on a whim. This is particularly important for large-scale property development that is dependent on infrastructure such as sewer and water systems and road improvements that are financed by special assessments. If a property owner cannot depend on receiving the improvements as set out in the officially approved plans, but still must bear the cost of the special assessment, that would introduce an element of uncertainty that would likely deter developers from undertaking property development projects. That uncertainty would also make it more difficult and more expensive to develop property.

## **B. Effect on Lenders**

Another policy consideration is stability in the mortgage lending market for specially assessed property. The lien for special assessments takes priority over previously recorded encumbrances, such as purchase money mortgages. MCL 41.728 (special assessments are a lien from the date of confirmation of the assessment roll); MCL 211.60(4) (delinquent tax lien is “preferred or first claim on the property”); MCL 211.60a(4). The justification for this super-priority lien is that the value of the property increases by at least the amount of the special assessment because of the improvements that benefit the property. Thus the imposition of a super-priority special assessment lien on property should not affect the willingness of lenders to make mortgage loans because the lien does not affect their security. However, if the improvements can later be eliminated and the property is burdened by a special assessment without the corresponding benefit, the security of prior lien holders is impaired. Consequently, if townships are allowed to arbitrarily eliminate the approved benefit to the property, without any relief to the property owners, lenders will be less willing to make mortgage loans to developers. This would have a significant negative impact on the future of development of real property in the State of Michigan.

## **CONCLUSION**

If a special assessment improvement is approved, the assessed property must obtain the benefit of the improvement. If the improvement is eliminated, due process requires that the property owner must have an opportunity to contest the elimination in order to protect its property interest. Furthermore, if private property is taken by the government for public purposes, the affected property owner is entitled to just compensation for the value of the property taken.

The Real Property Law Section respectfully requests that this Court hold that due process requires that real property owners subject to a special assessment be given an opportunity to contest the special assessment if the benefit to the specially assessed property is significantly reduced or eliminated, subsequent to the time allowed for filing a special assessment petition. Further, the Real Property Law Section urges this Court to find that if the special assessment lacks a reasonable proportionality with the benefit to the property, the affected property owners shall be granted just compensation for the value of the property taken. This Court should reverse the Court of Appeals and remand this case for a consideration of Highland-Howell's petition on its merits.

THE REAL PROPERTY LAW SECTION

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